Law and Equity have held that two parties may concur in an illegal act without being deemed to be in all respects in *pari delicto*." I cannot see that in the present case the offence by the plaintiff is as great as the offence by the partners, if any offence there be by the plaintiff. This is not a case of trading with a completely unlicensed rubber dealer but the case of a person dealing with a licensed dealer in partnership with unlicensed partners. There will therefore be judgment for the plaintiff against the second defendant as prayed with costs.

Claim allowed.

Solicitors: *Balwant Singh; Donaldson & Burkinshaw.*

PONNUSAMY & ANOR. v. NATHU RAM

[C.A. (Thomson C.J., Rigby and Hepworth JJ.) August 26, 1958]

[Ipoh — F.M. Civil Appeal No. 7 of 1958]

Sale of land — Transfer executed but not registered — Purchaser in possession — Death of purchaser — Action by executors of purchaser for declaration of title and rectification of register — Whether action for recovery of land — Limitation — Period of — Land Code (F.M.S. Cap. 138) — Limitation Enactment (F.M.S. Cap. 18) Article 97 — Limitation Ordinance, 1953, ss. 6 and 9.

In August, 1944, respondent sold his land to Naina (of whose will appellants are the executors) and executed a transfer in statutory form. Naina entered into possession but did not register the transfer. He died on February 11, 1949 and thereupon the transfer became unregistrable. The appellants brought an action on December 1, 1956 claiming declaration of title to the land and an order on the registering authority to register appellants as proprietors. The respondent pleaded limitation as one of his grounds of defence which point of law was disposed of by the trial Judge under R.S.C. 1957 O. 25. The trial Judge having considered the pleadings held (i) that the action was for a declaration of title and was governed by article 97 of the Limitation Enactment (Cap. 18), (ii) having regard to the defence, the respondent had taken steps to challenge Naina's rights, (iii) the date of Naina's death, i.e. February 11, 1949, was the crucial date when the right to sue accrued, but, by reason of the Moratorium, limitation ran from October 1, 1949 when it was lifted, (iv) the action having been commenced more than 6 years after that date, it was barred by limitation. The appellants appealed.

Held by the Court of Appeal: (1) the issue of limitation having been disposed of under R.S.C., O.25, it fell to be dealt with on the assumption that the facts were as stated in the plaint;

(2) the action was one to recover land within the meaning of section 9 of the Limitation Ordinance;

(3) the period of limitation for such an action is 12 years and the present action was not barred.

Cases cited:—

(1) *Noyes v. Crawley,* 10 Ch.D. 31.

(2) *Lala Soni Ram v. Kanhaya Lal.* L.R. 40 I.A. 74.

(3) *Bolo v. Koklan,* L.R. 57 I.A. 325.

(4) *Bachan Singh v. Mahinder Kaur & ors.* (1956) M.L.J. 97.

(5) *Loke Yew v. Port Swettenham Rubber Co.,* (1913) A.C. 491.

(6) *Suppiah Chettiar v. Ong Pee Koi & anor.,* (1951) M.L.J. 49.

(7) *Bridges v. Mees,* (1957) 2 All E.R. 577.

(8) *Mills v. Haywood,* 6 Ch.D. 196.

(9) *Abdul Rahman Khan v. Lala Parsotani Das,* (1930) 128 I.C.

(10) *Butcher v. Reeves,* (1891) 2 Q.B. 509.

(11) *Board of Trade v. Cayser, Irvine & Co., Ltd.,* (1927) A.C. 610.

(12) *Pir Baksh v. Mohamed Tahir,* L.R. 61 I.A. 388; A.I.R. 1934 P.C. 236.

(13) *Haji Osman v. Saiyed Noor* (1952) M.L.J. 37.

(14) *Venkatachalam Chettiar & ors. v. Arunasalam Chettiar* (1953) M.L.J. 19, (1954) M.L.J. 234.

(15) *Williams v. Thomas* (1909) 1 Ch. 713.

COURT OF APPEAL — appeal against the decision of Syed Sheh Barakbah J.

B. K. Das (*P. P. Dharmananda* with him) for the appellants: Plea of limitation taken as a preliminary point of law, by way of demurrer — Court must accept facts as stated in plaint as correct in deciding this point of law. *Noyes v. Crawley.* (1)

Article 97 of the Limitation Enactment, (Cap. 18) does not apply. Before period under article 97 expired, new Limitation Ordinance No. 4 of 1953 came into force. Court must apply statute in force at date of institution of action. *Lala Soni Ram v. Kanhaya Lal.* (2) Section 34(a) Limitation Ordinance has retrospective effect.

N. Sharma for the respondent — concede new Ordinance applies, but say period is 6 years under section 6(6), not 12 years.

Das (continuing):

Right to sue under article 97 accrues when there is infringement of or clear and unequivocal threat to infringe right by defendant. *Bolo v. Koklan.* (3) Here, none, until defence filed.

This is an action for rectification of register. Section 240 Land Code, *Bachan Singh v. Mahinder Kaur & ors.*; (4) *Loke Yew v. Port Swettenham Rubber Co.* (5) If limitation applies, then 12 years under section 9, Limitation Ordinance.

Submit, respondent bare trustee for testator and appellants; purchase price paid, possession given. See definition of "trust" and "trustee" in the Limitation

Ordinance and the Trustee Ordinance (No. 66 of 1949), same as English Trustee Act; trust extends to implied and constructive trusts. *Suppiah Chettiar v. Ong Pee Koi;* (6) *Loke Yew's case.* (5) Limitation does not apply, not hit by section 9 of new Ordinance.

Refer to sections 15, 12 and 11 (i) of the Limitation Ordinance corresponding to sections 10, 7 and 6 of English Limitation Act, 1939. Submit, when beneficiary in adverse possession as against trustee, as in this case. time runs against trustee and in favour of beneficiary. *Underhill* on Trusts & Trustees, 10th Edn., pp. 231-2, *Bridges v. Mees.* (7)

No question of laches, as contract executed, and section 6(6) and section 32, Limitation Ordinance, have no application. *Mills v. Haywood.* (8)

This is not an action for specific performance; in any event, no evidence of unconditional refusal to perform, the onus of proof being on respondent. *Abdul Rahman Khan v. Lala Parsotani Das.* (9)

Sharma: I concede plea of limitation should have been decided only on facts pleaded in plaint, defence should not have been looked at. In determining limitation regard should be had to the essence of the suit, which is for a declaratory decree under section 41, Specific Relief Ordinance, 1950. Appellants claiming equitable relief to which limitation applies, section 6(6) Limitation Ordinance.

Limitation Ordinance though modelled on English Act in some respects vitally different, compare section 6(6) with section 2(7) English Act. Here section 6(1) and (6) applies. Section 22 not applicable.

Right of deceased, and, therefore, of appellants, rest on contract.

Cause of action accrues on earliest date on which action could have been brought; *Reeves v. Butcher,* (10) *Board of Trade v. Cayser, Irvine & Co., Ltd.* (11)

Time would have begun to run from date of transfer, that is, August 24, 1944, but, by reason of moratorium, ran from October 1, 1949 and claim barred on September 30, 1955.

On death of Naina, executors stepped into his shoes. Irrelevant when probate extracted. Once time begins to run nothing can stop it. Section 16(i) Limitation Enactment (Cap. 18).

Respondent not a trustee. No interest passes until registration, section 96 Land Code; 'interest' means both legal and equitable interest. Appellants' claim rests on contract. *Pir Baksh v. Mohamed Tahir.* (12)

Even if respondent is regarded a trustee, which I deny, claim still barred. No title can be acquired by adverse possession, section 43 Land Code. Respondent's title as registered proprietor indefeasible, section 42 Land Code. *Haji Osman v. Saiyed Noor.* (13) *Venkatachalam Chettiar v. Arunasalam Chettiar.* (14) Section 9(2)(b) Limitation Ordinance.

Claim for relief under section 240, Land Code, consequential to main relief for declaration. If main relief barred, consequential relief also barred.

Not a suit for recovery of land.

Das in reply: This is an action to recover land. *Williams v. Thomas.* (15)

Thomson C.J. (delivering oral judgment): I would briefly preface what I have to say regarding this appeal by expressing the gratitude and appreciation of the Court for and of the extremely helpful and thorough and, if I may say so, relevant arguments to which we have listened from counsel. It says a great deal for the thoroughness and care of counsels' arguments that we find ourselves in a position to dispose of the appeal here and now.

I shall come shortly to the framework of the action with which we are concerned, but before doing so it is to be observed that in it limitation was pleaded as one of several defences and the trial Judge, with the agreement of the parties, very properly decided to dispose of that issue of limitation in the first place. The proceedings accordingly went on under the provisions of Order 25. In the event the learned Judge found that the plea of limitation succeeded and he accordingly dismissed the action with costs. It is against that decision that the plaintiffs have now appealed.

As I have said, the matter was dealt with under Order 25 which contains the procedural provisions which nowadays have replaced proceedings by way of demurrer and accordingly it fell to be dealt with on the assumption that the facts were as stated in the plaint. So far as they appear to be relevant these facts are as follows.

The plaintiffs (the present appellants) are the executors of the estate of one Naina who died on the 11th of February, 1949, and the defendant at all material times was and still is the registered proprietor of the piece of land in the township of Taiping which formed the subject matter of the action. On or about 24th August, 1944, which it is to be observed was during the Japanese occupation, the defendant sold the land in question to the deceased for a sum of $10,000, executed a Memorandum of Transfer in accordance with the provisions of the Land Code and handed this transfer together with the Grant to the deceased. For reasons which are not altogether clear, and with which in any event we are not here concerned, the transfer was not immediately presented for registration and after the end of the war it became incapable of being presented by reason of the legislation which occupied such a great portion of our time in these Courts for a number of years recently. Then the purchaser died. There was considerable delay in extracting probate of his Will and the present proceedings were not commenced until 23rd November, 1956. Up till that date the defendant had refused to do anything of any sort in connection with the sale of the land to the deceased although the deceased had gone into and remained in possession.

The plaintiffs in their plaint related the facts which I have just set out and concluded by asking in the first place for a declaration that the executors were entitled to the land in question and in the second place for an order in terms of the Land Code that the proper Registering authority do make such memorials in the Register and issue Document of Title No. 4886 for Lot No. 298 in the township of Taiping as may be necessary to register the testate (presumably they mean the deceased) as the proprietor thereof.

To my mind the whole appeal stands or falls according to the nature of the claim and in my opinion the claim constitutes an action to recover land.

I do not propose to repeat what I have said on previous occasions regarding the local land laws as, for example, in the case of *Bachan Singh v. Mahinder Kaur & ors.* (4) I think, however, that it is abundantly clear that by reason of the provisions of the Land Code and particularly by reason of sections 42 and 43 the question of whether the deceased ever had any rights *in rem* as distinct from rights *ad rem* does not arise at this stage for it is clear that the whole right, title and interest in the land are still in the defendant for the reason (and it is a very simple reason) that he is the registered proprietor. He is on the register and therefore the whole right, title and interest in the land are vested in him. As I put it colloquially this morning in the course of discussion with counsel, what the plaintiffs are doing is this. They are coming to the Court and saying "we are entitled to this land and we want this land." And if the Court is in agreement with them that they are entitled to the land and should be given the land, one appropriate way of giving it to them, in view of the provisions of the Land Code, is to make the declaration asked for and the consequential order on the registering authority. That reasoning leads me to the conclusion that this is an action to recover land within the meaning of section 9 of the Limitation Ordinance (No. 4 of 1953). I find support for the view in the case of *Williams v. Thomas.* (15) In that case the question related to certain rights of a dowress in land and is not, I think, very relevant here, but in the course of his judgment in the Court of Appeal Buckley, L.J., discussed the question of what was an action to recover land for the purposes of the Real Property Limitation Act, 1833, and said (at page 730):—

> "It has been argued, and, I think, successfully, that while on the one hand the expression 'to recover any land' in section 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means 'obtain any land by judgment of the Court' yet it is not limited to the meaning 'obtain possession of any land by judgment of the Court'."

What in effect the plaintiffs in the present case are seeking to do is to "obtain.....land by judgment of the Court."

Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within section 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case of actions founded on a contract the period of limitation shall be six years but that provision is expressly stated to be "save as hereinafter provided." By section 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

It follows from what has been said that the period of limitation applicable in the present case was 12 years by reason of section 9 and not 6 years by reason of section 6 and it is common ground that by reason of the post-war legislation on the subject that period of limitation runs from the expiration of the moratorium period on 30th September, 1949. In the circumstances the present action was commenced well within time.

On these grounds I would allow the appeal and would set aside the order of the Court below. In my opinion no further order is necessary because the consequence of what I propose is that the case will continue and be tried out on its merits, if it has any.

As regards costs in the Court below, I would order that the appellants have in any event so much of the costs as can be attributed to the pleading and trial of the question of limitation. As regards the costs of appeal, I would give those to the appellants and make the usual order for payment out to them of their deposit.

Rigby and Hepworth JJ. concurred.

Appeal allowed.

Solicitors: *Chabra & Dharnananda; N. Sharma.*